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COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
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No. PD-0790-20

TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
1/20/2021
DEANA WILLIAMSON, CLERK

ROBERTO HERNANDEZ, Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from Navarro County, Trial Cause D38732-CR
No. 10-19-00252-CR

* * * * *

STATE PROSECUTING ATTORNEY'S BRIEF ON THE MERITS

* * * * *

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IDENTITY OF JUDGE, PARTIES, AND COUNSEL

* The parties to the trial court's judgment are the State of Texas and Appellant Roberto Hernandez.

* The trial judge was Hon. James Lagomarsino, Presiding Judge of the 13th District Court, Navarro County, Texas.

* Counsel for Appellant at trial was Damara Watkins, 1541 Princeton, Corsicana, Texas 75110.

* Counsel for Appellant before the Court of Appeals and before this Court is Shana Stein Faulhaber, P.O. Box 3078, Corsicana, Texas 75151.

* Counsel for the State at trial were Navarro County Assistant District Attorneys Kenneth Leatherman and Bolton Harris, 300 W. 3rd Ave, Suite 301, Corsicana, Texas 75110.

* Counsel for the State before the Court of Appeals was Robert Koehl, Assistant District Attorney, 300 W. 3rd Ave, Suite 301, Corsicana, Texas 75110.

* Counsel for the State before this Court is Emily Johnson-Liu, Assistant State Prosecuting Attorney, P.O. Box 13046, Austin, Texas 78711.

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TO THE COURT OF CRIMINAL APPEALS

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* * * * *

STATE'S PETITION FOR DISCRETIONARY REVIEW

* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Appellant persuaded the court of appeals to his view of things: that he was entitled to an instruction on a lesser-included sex offense because his testimony offered an alternative version of the incident. The court should have analyzed whether Appellant's version involved the same elements and—alongside *Hall*'s pleading approach to lessers—unit of prosecution.

STATEMENT REGARDING ORAL ARGUMENT

This Court granted oral argument.

STATEMENT OF THE CASE

Appellant was indicted for aggravated sexual assault of a child.[1] The trial court denied his request for lesser-included-offense instructions on indecency with a child by contact and exposure.[2] The jury convicted him and assessed a 35-year sentence.[3] On appeal he complained about the omission of the indecency-by-contact lesser; the omission of an exposure lesser went unchallenged.[4] The court of appeals agreed it was error to omit indecency by contact from the charge and remanded for a new trial.[5]

ISSUES GRANTED

(1) Is indecency by touching the victim's sexual organ a lesser-included offense of penetrating the child's mouth with the defendant's sexual organ if the former is the defendant's version of the incident?

(2) For indecency by contact to be a lesser of aggravated sexual assault, must the act on which the indecency is predicated have the potential to be factually subsumed within the aggravated sexual assault?

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[1] CR 19.

[2] 5 RR 9, 11-12.

[3] 5 RR 51, 195.

[4] App. COA Brief at 6, 7.

[5] *Hernandez v. State*, No. 10-19-00252-CR, 2020 WL 4360789 (Tex. App.—Waco, July 29, 2020) (not designated for publication).

STATEMENT OF FACTS

Appellant was accused of penetrating his ten-year-old daughter's mouth with his penis.[6] She testified he led her into a storage container on the property where they were living, lowered her to her knees, and used his hands to put his "middle part" in her mouth for about a minute.[7] Then he pulled up his pants and left the container.[8] The victim went outside and told her mother, Appellant's wife. Sometime before, Appellant disclosed to his wife that the victim's older brother had been sexually inappropriate with the victim, and she knew some of the details second-hand.[9] So when the victim told her that day that the same thing had happened in the storage container with her father as had happened with her brother, the victim's mother knew Appellant had her perform oral sex.[10] The police were alerted, and Appellant was eventually arrested and gave a statement.[11] In it, Appellant acknowledged that they removed some of their clothing in the storage container, he

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[6] CR 19.

[7] 3 RR 101, 107-10.

[8] 3 RR 110.

[9] 3 RR 47-48.

[10] 3 RR 58-61, 64.

[11] 3 RR 113.

touched her sexual organ with his hand, and he hugged her while they were naked from the waist down.[12] He denied anything else.[13]

Appellant's trial testimony was similar to his police statement.[14] He denied oral sex but admitted using his hand to touch her sexual organ with a sexual purpose, both with and without her clothes on.[15] He also pulled her body next to his while they were naked from the waist down.[16] He denied ever lowering her to her knees and said they were both standing the whole time.[17] Neither her mouth nor her face touched his penis.[18] He denied rubbing his penis on any part of her body but admitted contact with his penis and her body.[19]

> Q: When the District attorney was asking you about the hugging – it's been described at one time as hugging, possibly rubbing. I'm

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[12] 3 RR 81-88.

[13] 3 RR 84.

[14] 4 RR 18.

[15] 4 RR 18-19.

[16] 4 RR 20-21. Although Appellant may have also committed indecency by exposure, failure to submit that offense was not raised as an issue on appeal, and the record is not clear on certain facts, such as the length of Appellant's shirt and whether the indecency by contact by touching her body with his penis occurred through clothing.

[17] 4 RR 21.

[18] 4 RR 41, 78.

[19] 4 RR 41, 98, 100.

confused how -- how is it – she's got – she's naked from the waist down, correct?

A: Yes.

Q: And at that time you were also, correct?

A: Yes.

Q: And you were pressing your body up to hers, correct?

A: Yes.

Q: Okay. And it's -- is it likely that your penis touched her body when you were pressing up to her?

A: At some point, yes.

Q: Okay. So when the DA, asked you did you -- did you touch your penis -- or did – can't remember exactly how he put it. But did you take your penis and touch her body with it? I mean, like physically move it to touch her?

A: No.

Q: Okay. But as you were leaning up against her and pressing up against her it probably touched her body?

A: Yes.[20]

At various points, he said they were not facing each other and not shoulder-to-shoulder either but at this point were "[t]ouching body against body," both standing the entire time.[21]

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[20] 4 RR 98.

[21] 4 RR 21, 40, 78-79, 100.

At the charge conference, the State objected to submitting any lesser-included offenses. It argued that the only evidence that arguably raised the issue was that Appellant "may have touched her with his penis or touched her vagina with his hand" but argued "that is [a] completely different offense from what is alleged in the indictment." [22] Appellant distinguished case law where the proposed lessers occurred on a different day from the charged offense and argued:

> we're talking about obviously the same act of molestation and that it was an act that occurred at the exact same time and in the course of what the testimony has suggested and indeed absolutely proved was less than a few minutes….Particularly with the touching of the Defendant's penis to the body…of the child. There could be no oral sexual assault without contact with the penis with the child's body. And so we would argue that it is [subsumed] within contact with his penis and her body[;] there's not any requirement that it has to be the same part of the body because indecency is available for any part of the body.[23]

The trial court denied Appellant's requests for lesser-included offense instructions.[24] In closing arguments, the State did not rely on either of Appellant's admissions as conduct for which to convict Appellant of aggravated sexual assault of a child. The defense urged the jury to believe Appellant's account, pointing out

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[22] 4 RR 106-07.

[23] 4 RR 108-09.

[24] 5 RR 9-12.

that Appellant would not have admitted to touching his daughter's vagina if it did not happen and reminding the jury that he never confessed to what he was accused of.[25] It also explained that the State could bring a charge for what he confessed to at a later time and that he would have to face the consequences for what he did do.[26] The jury convicted Appellant of penetrating the victim's mouth with his penis.

The parties' arguments in the court of appeals

On appeal, Appellant argued his request for a lesser of indecency by contact should have been granted because both sides presented evidence of a single act of inappropriate behavior in the storage container and that his evidence constituted a lesser-included version.[27] Under *Hall v. State*'s cognate-pleadings approach to lessers, an offense can be submitted as a lesser-included offense if (1) it meets the test under TEX. CODE CRIM. PROC. Article 37.09[28] for a lesser-included offense by

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[25] 5 RR 44.

[26] 5 RR 35, 46.

[27] App. COA Brief at 8-10. In the defense's view, only a single act occurred: the jury could rationally believe the girl's version did not happen and that she confused an earlier incident when her brother had her perform oral sex on him.

[28] Article 37.09 sets out four definitions of a lesser, the first of which is at issue:

(1) it is established by proof of the same or less than all the facts required to establish the commission of the offense charged.

(2) it differs from the offense charged only in the respect that a less serious injury or

comparison of the statutory elements as alleged in the indictment, and (2) there is evidence at trial that, if the defendant is guilty, he is guilty only of the lesser.[29] The State conceded that indecency with a child can be a lesser-included of aggravated sexual assault and called this the first step of *Hall*.[30] The State also argued—as part of the second step—that touching the victim's sexual organ was not a lesser in this instance because it was a "separate and distinct offense" from the charged aggravated sexual assault and inadvertently touching the victim's body with his penis did not constitute "the same or less than all the facts" required for the aggravated sexual assault and did not otherwise warrant submission to the jury.[31]

The court of appeals's decision

The court of appeals's resolution of the first step of *Hall* was swift: "The State concedes, and we agree, that the offense of indecency with a child by contact can be

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risk of injury to the same person…suffices to establish its commission; or

(3) it differs from the offense charged only in the respect that a less culpable mental state suffices to establish its commission; or

(4) it consists of an attempt to commit the offense charged or an otherwise included offense.

TEX. CODE CRIM. PROC. art. 37.09.

[29] 225 S.W.3d 524, 535 (Tex. Crim. App. 2007).

[30] State COA Brief at 1-2, 4.

[31] *Id*. at 2, 5-6.

a lesser-included offense of aggravated sexual assault of a child."[32] It cited *Ochoa v. State*[33] with the parenthetical that indecency is a lesser when both offenses are "based on the same incident."[34]

It then proceeded to the second step. There, it concluded that submission of indecency with a child by contact was warranted because, while Appellant denied penetrating the child's mouth with his penis, he "offered a valid, rational alternative version of the incident, which included his admission to a different offense—indecency with a child by contact."[35] It never specified which indecency warranted the instruction.[36]

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[32] *Hernandez*, 2020 WL 4360789, at *2.

[33] 982 S.W.2d 904, 908 (Tex. Crim. App. 1998).

[34] *Hernandez*, 2020 WL 4360789, at *2.

[35] *Id.*

[36] *Id.* ("[A]ppellant denied that he intentionally or knowingly touched the child victim at all with his penis. Rather, appellant admitted to touching the child victim inappropriately with his hands with intent to arouse his sexual desire while they were both inside the container. Appellant further testified that both he and the child victim pulled their pants down while in the container, and appellant pulled the child victim close to him and rubbed their bodies together.").

ARGUMENT

Two steps of lesser-included offense submission.

Following earlier cases,[37] *Hall v. State* reiterated that determining whether an offense should be submitted as a lesser requires a two-step analysis: (1) whether the proposed offense is indeed a lesser under Code of Criminal Procedure Article 37.09, and (2) whether there was sufficient evidence of that lesser to require submission in the charge.[38] Under the first step, an offense is a lesser under Article 37.09 if "it is established by proof of the same or less than all the facts required to establish the commission of the offense charged."[39] And *Hall* determined that the "facts required to establish …the offense charged" are the elements and facts alleged in the indictment or information, not simply proof that arises at trial.[40] In fact, *Hall* says that no resort to the record should be made in the first step; it is a legal question alone.

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[37] *See, e.g.*, *Royster v. State*, 622 S.W.2d 442, 446 (Tex. Crim. App. 1981); *Eldred v. State*, 578 S.W.2d 721, 722 (Tex. Crim. App. 1979), *disapproved of on other grounds by Hall*, 225 S.W.3d at 531, n.30.

[38] 225 S.W.3d at 528. This second element is sufficient if there is some record evidence that would permit a jury to rationally find that if the defendant is guilty, he is guilty only of the lesser-included offense. *Id*. at 536.

[39] TEX. CODE CRIM. PROC. art. 37.09.

[40] *Hall*, 225 S.W.3d at 535-36.

Which step of the *Hall* analysis are we on?

In its brief to the court of appeals, the State said, "the State does not contest the first step."[41] But it also made clear that it was saying that, theoretically, *an* indecency with a child could be a lesser of this alleged aggravated sexual assault of a child, and that Appellant's complaint failed at step two because no evidence was produced of such an indecency, only evidence of indecencies that were not lessers.[42] It may have been better to say that Appellant's proposed lessers were not lessers of the charged offense under step one. The court of appeals erred because it appears that, in agreeing to the State's concession, it relied solely on the State's *Hall* numbering and never examined its claim that the proposed offenses were not actually included within the charged offense:

> The State concedes, and we agree, that the offense of indecency with a child by contact can be a lesser-included offense of aggravated sexual assault of a child. *See Ochoa v. State*, 982 S.W.2d 904, 908 (Tex. Crim. App. 1998) (concluding that indecency with a child is a lesser-included offense of aggravated sexual assault of a child where both charges are based on the same incident); *see also Evans v. State*, 299 S.W.3d 138, 143 & n.6 (Tex. Crim. App. 2009). We therefore proceed to the second step in the *Hall* analysis. Step two of the *Hall* analysis involves the consideration of whether there is some evidence that would permit a rational jury to find that, if appellant is guilty, he is guilty only of the

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[41] State's COA Brief at 4.

[42] *Id*. at 4-6.

lesser offense.[43]

It is also possible, based on the court's *Ochoa* parenthetical and citation to *Evans*, that the court of appeals did a complete step-one analysis but improperly concluded that one of the indecencies was a lesser because it was "based on the same incident." Either way, the court of appeals was wrong. As developed more fully below, the court of appeals should have conducted a threshold inquiry into the unit of prosecution, a question that would have quickly revealed that neither indecency by contact that Appellant admitted to could be a lesser of the charged offense under Article 37.09(1).

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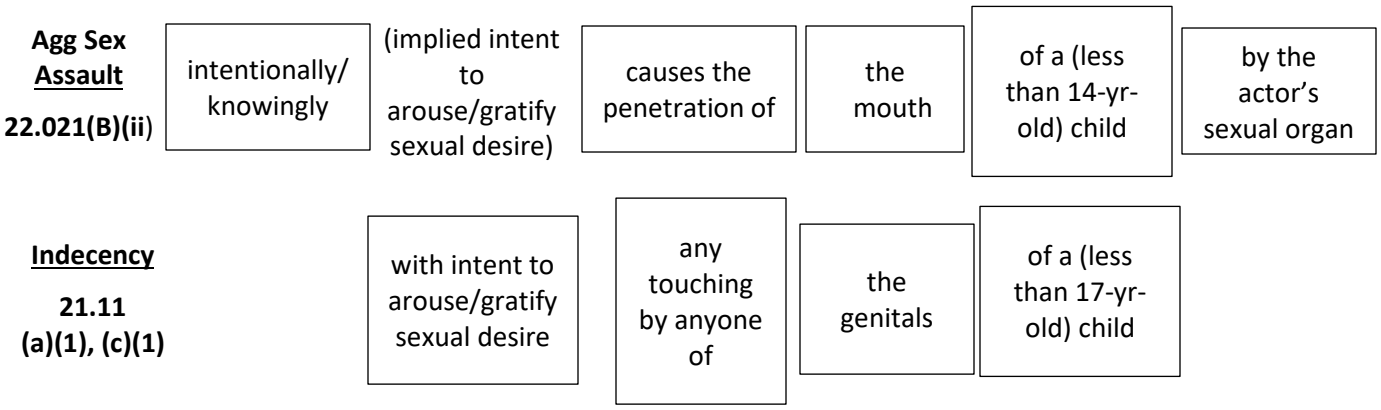
[43] *Hernandez*, 2020 WL 4360789, at *2

Fondling the victim's genitals isn't a lesser under an elements analysis.

The first possible lesser can be rejected under a straightforward elements comparison. From among the various statutory means of committing aggravated sexual assault of a child, this indictment selected one: penetrating the child's mouth with the defendant's sexual organ.[44] To constitute a lesser, the proposed offense must contain the same or less than all these elements.[45] Indecency by touching the *victim's* sexual organ (an offense prohibited by TEX. PENAL CODE § 21.11(a)(1), (c)(1)) does not:



The offenses are similar because intent to arouse or gratify has been deemed not to be a difference between these offenses,[46] touching can obviously be less than

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[44] TEX. PENAL CODE § 22.021(a)(1)(B)(ii).

[45] TEX. CODE CRIM. PROC. art. 37.09(1).

[46] *Evans*, 299 S.W.3d at 142.

penetration, and, in proving the child was less than 14 for aggravated sexual assault, the State will also necessarily prove she is less than 17. But the two offenses diverge radically in the body parts involved. And these differences are at the level of elements.

The offense of indecency by contact is structured in two parts. Section 21.11(a) contains the usual "[a] person commits an offense language" and it prohibits two forms of conduct: engaging in "sexual contact" and exposure. Section 21.11(c) further defines "sexual contact," which, when committed with the intent to arouse or gratify sexual desire, includes

> (1) any touching by a person…of …any part of the genitals of a child; or
>
> (2) any touching of any part of the body of a child …with …any part of the genitals of a person."[47]

Because indecency with a child is a conduct-oriented offense,[48] the definitions of "sexual contact" in § 21.11(c) thus become elements of indecency by contact.[49]

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[47] TEX. PENAL CODE § 21.11(c)(1), (2).

[48] *Pizzo v. State*, 235 S.W.3d 711, 719 (Tex. Crim. App. 2007).

[49] *See id.* (relying on definition of "sexual contact" to hold that touching the anus, touching the breast, and touching the genitals each constitutes a different criminal offense for jury-charge unanimity purposes); *see also Speights v. State,* 464 S.W.3d 719, 723 (Tex. Crim. App. 2015) (indecency by contact and indecency by exposure set out separate allowable

Sexual abuse by contact between the child victim's mouth with the defendant's genitals was an example *Hall* gave as not supporting a conviction for indecency by contacting a different orifice of the child.[50] Because contact with the victim's genitals is not alleged in this indictment nor can its elements be deduced therefrom, it is not a lesser under *Hall*. To the extent the court of appeals conducted a comparison of elements at all, it erred.

It is also not a lesser for the same reason as the second possible indecency (contacting or grazing the victim's torso or limbs with his penis). That reason, discussed next, is that these proposed lessers constitute different units of prosecution, and thus different offenses, from the aggravated sexual assault charged in the indictment.

Grazing victim's torso or limbs with his penis isn't a lesser because it's a different unit of prosecution.

Appellant's description of grazing the victim's body with his penis during a

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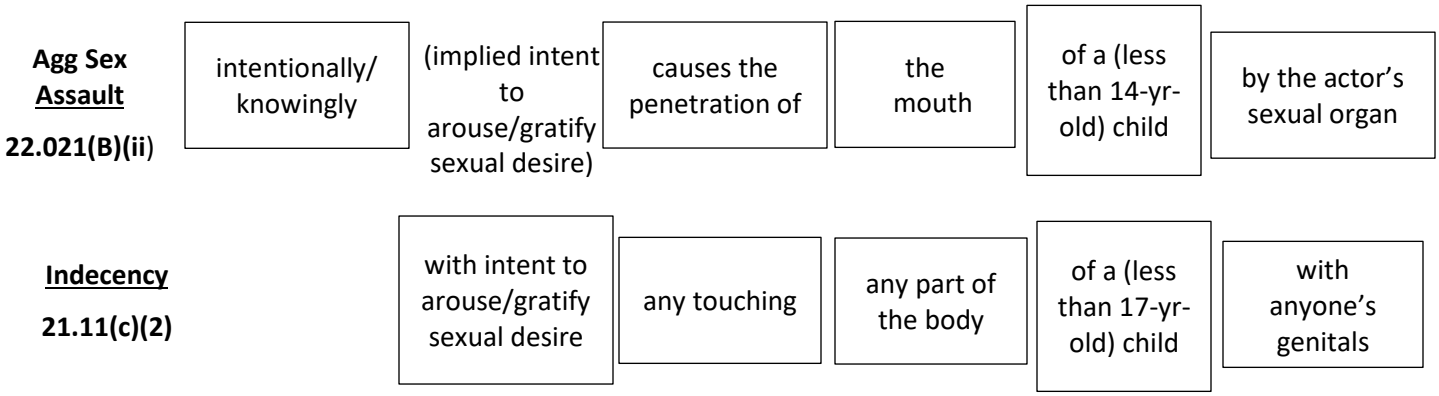
units of prosecution); *Geick v. State*, 349 S.W.3d 542, 546-47 (Tex. Crim. App. 2011) (in variance context, definitions within theft statute set out elements of narrowed, more specific offenses encompassed within the general theft statute).

[50] 225 S.W.3d at 531 (citing *Martinez v. State*, 599 S.W.2d 622, 624 (Tex. Crim. App. [Panel Op.] 1980)); *see also McIntire v. State*, 698 S.W.2d 652, 656 (Tex. Crim. App. 1985) (affirming court of appeals' decision to vacate indecency conviction because of improper joinder: it couldn't be joined in the same indictment with aggravated sexual abuse of a child because it was a "separate and distinct" offense).

hug (if it were done with intent to arouse or gratify his sexual desire) is prohibited by subsection 22.01(c)(2) of the indecency statute. A comparison of those statutory elements to the charged offense reveals that some (c)(2) indecencies could be lessers.



In *Cunningham v. State*, this Court determined that licking the defendant's sexual organ was such a lesser.[51] It obviously constitutes touching part of the body of the child, *i.e.*, the tongue, with the actor's sexual organ, and the Court could reason that the tongue, as part of the mouth, was less than all the facts required to prove aggravated sexual assault's element that the offense involve the mouth. And in *Patterson v. State*, this Court said that penile contact with a child's mouth in the course of penetrating it would be a subsumed lesser.[52] An offense may be subsumed

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[51] 726 S.W.2d 151, 151 & n.1, 154 (Tex. Crim. App. 1987), *rationale disapproved of by Hall*, 225 S.W.3d at 531 & n.30.

[52] *Patterson v. State*, 152 S.W.3d 88, 92 (Tex. Crim. App. 2004); *see also Aekins v. State*, 447 S.W.3d 270, 277 n.28 (Tex. Crim. App. 2014) ("[O]ne rape will frequently involve the defendant's acts of exposing his genitals, then contacting the victim's genitals with his

when there is a single act that cannot physically occur in the absence of another act.[53] Such a standard meets the same or less than all the statutorily pled elements of the greater because it is impossible to commit the charged offense without also committing that lesser. But this is where the possible lessers end.

Appellant testified that his penis may have contacted his daughter's body (but not her face or mouth[54]) while he hugged her. This offense does not satisfy the requirements of Article 37.09(1) because it is not "established by proof of the same or less than all" the elements required to prove penetration of the child's mouth. It cannot have constituted a lesser-included offense because, unlike *Cunningham* or *Patterson*, it was not part of the same act.

Multiple instances of the same prohibited conduct of indecency are different offenses.

Under a unit of prosecution analysis, Appellant's body-grazing confession constituted a different offense, and importantly, one not covered by an indictment requiring involvement of the child's mouth. The allowable unit of prosecution for

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own, then penetrating the victim's genitals with his. It is a 'continuing' crime in the sense that the defendant commits several criminal acts on the way to completing the rape, but the lesser acts of exposure and contact merge into the ultimate act of penetration.").

[53] *Maldonado v. State*, 461 S.W.3d 144, 149 (Tex. Crim. App. 2015).

[54] 4 RR 41, 78.

indecency with a child, which is derived from its gravamen, is the prohibited conduct.[55] Here, the prohibited conduct is the touching of the child with the defendant's genitals. As this Court's Double Jeopardy cases have repeatedly held, the unit-of-prosecution for nature-of-conduct sex offenses like sexual assault[56] and indecency[57] is each separately prohibited act, even for acts committed on the same date or during the same "transaction."[58] And multiple instances of the same statutorily prohibited conduct, even those committed in the same place around the same time, can result in multiple convictions.[59]

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[55] *Loving v. State*, 401 S.W.3d 642, 648 (Tex. Crim. App. 2013); *see also Maldonado*, 461 S.W.3d at 150 (explaining that the focus of sex offenses is the prohibited conduct and the legislature intended to allow separate punishments for each prohibited act, the multiple convictions do not violate the Double Jeopardy Clause.).

[56] *Vick v. State*, 991 S.W.2d 830, 833 (Tex. Crim. App. 1999) (aggravated sexual assault is conduct-oriented and "each separately described conduct constitutes a separate statutory offense"); *Gonzales v. State*, 304 S.W.3d 838, 848 (Tex. Crim. App. 2010) (discretely prohibited acts of aggravated sexual assault are separate offenses for double-jeopardy purposes even within the same subsection); *Metcalf v. State*, 597 S.W.3d 847, 857 (Tex. Crim. App. 2020) (same for sexual assault).

[57] *See Loving*, 401 S.W.3d at 649 (commission of each prohibited act determines number of possible convictions for particular course of conduct); *Francis v. State*, 36 S.W.3d 121, 124 (Tex. Crim. App. 2000) (touching the victim's breast and genitals constituted separate indecencies that jury would have to be unanimous about); *Pizzo*, 235 S.W.3d at 717 (each prohibited act of indecency represents a different offense).

[58] *Maldonado*, 461 S.W.3d at 147 (for sexual assaults, "Even separate acts that occur close in time can be separate offenses if each involves a separate impulse or intent.").

[59] *Aekins*, 447 S.W.3d at 282 ("If the victim says Dangerous Dan raped her, then forced oral sex, then raped her again, then forced oral sex again—there are four criminal

While this means that the jury must be unanimous about which of these offenses occurred,[60] it also means that separate instances of the prohibited conduct cannot be the same offense for a lesser-included analysis. In this case, because the charged offense required at least contact with the victim's mouth and Appellant's admission to grazing involved somewhere on her body other than her face or mouth, it was necessarily a different instance of prohibited conduct. Appellant's argument to the contrary and the court of appeals's resolution that Appellant merely offered an alternative version of the incident essentially ask this Court to permit him to be convicted of a lesser offense because it happened during the same transaction. That position is contrary to how this Court has consistently interpreted sex-offense prosecutions and should be rejected.

***Campbell* and *Bufkin* support this conclusion.**

Before *Hall*, this Court held in a series of cases that the defendant would not be entitled to a defensive issue or lesser-included offense if the defendant's version

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convictions possible."), 282 n.59 (explaining *Patterson,* 152 S.W.3d at 92, as permitting "two distinct, completed incidents of penile penetration separated by a bathroom break" to "[give] rise to two separate punishments"); *see also Ex parte Benson*, 459 S.W.3d 67, 73-74 (Tex. Crim. App. 2015) ("A 'units' analysis consists of two parts: (1) what the allowable unit of prosecution is, and (2) how many units have been shown.").

[60] *See Pizzo,* 235 S.W.3d at 716.

of events involved a different offense from the one the State was prosecuting, as determined by the proof presented at trial. In *Campbell v. State*, the State charged the defendant with possessing between 4 and 200 grams of methamphetamine and its proof at trial showed he possessed 8 grams of meth in a backpack in the car where he was sitting.[61] At trial, he denied the backpack was his but confessed to possessing, that same day, one gram of meth in a toolbox in his own car parked back at a motel. This Court determined that the mere fact that Appellant's admitted offense was covered by the indictment did not make it a lesser. "'[T]ime, place, identity, manner, and means, although not statutory, are germane to whether one offense includes another under Texas law.'"[62] Consequently, this separate offense, unrelated to the one for which he was prosecuted, did not warrant submission of a lesser.[63]

Similarly in *Hayward v. State*, the State charged Hayward with murdering her ex-husband by stabbing him with a knife or piece of glass.[64] The defense offered evidence that she did not stab him but wrestled with him and hit him with her fist.

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[61] 149 S.W.3d 149 (Tex. Crim. App. 2004).

[62] *Id*. at 155 (quoting *Parrish v. State*, 869 S.W.2d 352, 354 (Tex. Crim. App. 1994)).

[63] *Id*.

[64] 158 S.W.3d 476, 478 (Tex. Crim. App. 2005).

This Court held that the State could not have secured a valid conviction under the indictment based on this evidence and thus the trial court did not err in failing to give a lesser-included instruction on assault by wrestling or hitting.[65]

In *Irving v. State*, the State indicted the defendant, in part, for causing serious bodily injury by hitting the victim with a baseball bat.[66] Irving asked for a lesser on simple assault based on evidence that he grabbed the victim and fell with her into glass shelves that cut her. The Court held that this was not a lesser because proof of such an offense was not required to prove aggravated assault by hitting someone with a bat.[67] Given that assault is a result-oriented offense, *Hayward* and *Irving* might be better explained by saying that an assault resulting in a cutting injury is not included within what is necessary to establish a blunt-force trauma aggravated assault, or vice versa.[68]

In *Bufkin v. State*, the Court explained that, while the defendant cannot foist on the State a crime it did not intend to prosecute to get a defensive issue or lesser,

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[65] *Id*. at 480.

[66] 176 S.W.3d 842, 845-46 (Tex. Crim. App. 2005).

[67] *Id*. at 846.

[68] *See* State Prosecuting Attorney's Brief as Amicus Curiae, *Barrett v. State*, PD-1362-18 (rec'd Feb. 25, 2020).

"it is also true that the defendant has the right to controvert the facts upon which the prosecution intends to rely, and that right includes claiming that events unfolded in a way different than the State has alleged."[69] In *Bufkin*, the State alleged a family-violence assault, specifically causing bodily injury by hitting the victim with his hand and biting the her.[70] The State's proof was that both of these injuries occurred on a Saturday before officers arrived. Bufkin's evidence was that he hit the victim in self-defense that day but that the bites were consensual "love bites" bestowed the evening before.[71] The *Bufkin* Court held that a lesser-included-offense instruction was required because the factfinder could reasonably believe the parties' versions concerning the bites both referred to the same incident. Unlike in *Campbell*, where the evidence did not suggest only one possession occurred, the bite marks in *Bufkin* "supplied an evidentiary connection between the two proffered instances that suggested they were one."[72]

Under a proper *Campbell-Bufkin* analysis, Appellant's penile grazing constituted a different unit of prosecution than a factually subsumed lesser like

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[69] 207 S.W.3d 779, 781-82 (Tex. Crim. App. 2006).

[70] *Id*. at 781.

[71] *Id*.

[72] *Id*. at 783.

touching the victim's face, tongue, or mouth with his sexual organ. There was no evidence apart from Appellant's own denials to suggest that both offenses did not occur. That Appellant's was a different version of what happened in the storage container does not make it a lesser-included offense. Because indecency is a conduct-oriented offense and Appellant denied contact between his penis and her face or mouth, his description of grazing her torso or limbs with his penis cannot be the same instance of conduct.

A unit of prosecution analysis is not contrary to *Hall*'s pleadings approach.

It is not surprising that, in the court of appeals, the State shoe-horned its analysis into the second step. A unit of prosecution analysis (particularly repeated instances of the same statutory subsection) almost always entails considering more than statutory elements,[73] but *Hall* and its progeny state that the statutory elements—not the *record facts* of the proposed lesser—are to be compared to the

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[73] *Ex parte Castillo*, 469 S.W.3d 165, 169 (Tex. Crim. App. 2015) ("We determine factual sameness by determining the allowable unit of prosecution and reviewing the trial record to establish how many units have been shown."); *Ex parte Benson*, 459 S.W.3d at 73-74 (determining how many units have been shown requires an examination of the trial record which can include the evidence presented at trial); *see Byrd v. State*, 336 S.W.3d 242, 252 (Tex. Crim. App. 2011) (the property owner in a theft offense is not a statutory element but must be proven and defines the unit of prosecution); *Fuller v. State,* 73 S.W.3d 250, 256-57 (Tex. Crim. App. 2002) (Keller, P.J., concurring) (non-statutory facts can define allowable unit of prosecution).

elements of the greater in the pleadings for the first step of the analysis.[74] This conflict is also at issue in two pending cases, *Barrett v. State*, PD-1362-18, and *Ortiz v. State*, PD-1061-19, involving submission of a lesser of bodily injury assault when assault by occlusion or impeding breath is alleged.[75]

But in adopting the cognate-pleading approach, *Hall* need only have decided how abstractly or particularly to consider the greater offense for comparison.[76] While the parties could not look to the record facts of the lesser *instead of* its statutory elements to see if those evidentiary facts happened to be included within the requirements of the greater, that is not what occurs in a review of the number of

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[74] *Hall*, 225 S.W.3d at 525, 531; *see also Safian v. State*, 543 S.W.3d 216, 220 (Tex. Crim. App. 2018) (citing *Ex parte Castillo*, 469 S.W.3d at 169 and *Hall*)); *see also Fraser v. State*, 583 S.W.3d 564, 568 (Tex. Crim. App. 2019) ("as long as all of the elements of a purported lesser offense are contained (or deducible from what is contained) in the indictment, then the purported lesser offense can be said to be 'lesser-included' of the indicted offense.").

[75] *Dewey Dewayne Barrett v. State*, PD-1362-18 (submitted Mar. 18, 2020) (one of the issues granted on the Court's own motion: (3) Should *Irving v. State*, 176 S.W.3d 842 (Tex. Crim. App. 2005) be overruled in light of other developments in our caselaw?"); *Orlando Ortiz v. State*, PD-1061-19 (submitted Mar. 18, 2020) (issue granted: "When a defendant is charged with "assault by occlusion" pursuant to TEX. PENAL CODE § 22.01(b)(2)(B), does the denial of occlusion and admission to causing different injuries entitle him to an instruction on simple assault?").

[76] *See Hall*, 225 S.W.3d at 525-27 (outlining the lesser-included-offense approaches, which generally focus on what aspect of the *greater* offense—statutory elements, pleadings, evidence—should be used for comparison).

units shown. Also, even as *Hall* was rejecting a pure statutory comparison analysis in favor of looking at the accusatory pleading, it did so because it would align with Double Jeopardy analysis.[77]

It only makes sense that, in this context, the analysis should be the same for Double Jeopardy as for lesser included offense instructions at trial. If the trial court erroneously refuses a defense request for a lesser, wrongly believing it is a separate offense, and, following conviction or acquittal on the greater, the State brings a separate prosecution for that lesser, a double jeopardy analysis would apply at that stage. If truly a lesser, a units analysis should bar a subsequent prosecution.[78] Similarly, if the trial court properly denies the request for a lesser on grounds that it is a separate unit of prosecution, the analysis on a pre-trial writ of habeas corpus from the subsequent prosecution for the lesser should reach the same result as at the trial level under a units analysis.

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[77] *Id.* at 532-22 ("elements of offenses, as they are pleaded in the indictment, also are compared to decide whether multiple punishments violate the Double Jeopardy Clause"), 533-34 (quoting *Parrish*, 869 S.W.2d at 354, which recognized importance of non-statutory allegations to determine whether several offenses are the same for jeopardy purposes).

[78] *See Ex parte Castillo*, 469 S.W.3d at 169 (employing *Hall*'s first step analysis as a legal question before a unit-of-prosecution analysis).

Whether considered as a threshold issue before the first step of the lesser-included analysis, as a concluding step, or outside the framework entirely, a unit of prosecution analysis, where relevant, should still be performed. *Hall* has not overruled *Campbell* and the cases following it, and this case is a good example of why not. *Hall* set out to clarify when an offense truly was included within another under the definition in Article 37.09(1). Myopic focus on *Hall*'s comparison to the lesser-included-offense's statutory elements loses sight of that.

PRAYER FOR RELIEF

The State of Texas prays that the Court of Criminal Appeals reverse the judgment of the court of appeals and affirm Appellant's conviction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to Microsoft Word's word-count tool, this document contains 5,423 words, exclusive of the items excepted by Tex. R. App. P. 9.4(i)(1).

/s/ *Emily Johnson-Liu*
Assistant State Prosecuting Attorney

CERTIFICATE OF SERVICE

The undersigned certifies that on this 15th day of January 2021, the State's Brief on the Merits was served electronically on the parties below.

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